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Supreme Court, U. S.
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JUL 30 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-1704

BOARD OF JUNIOR COLLEGE DISTRICT NO. 515, COUNTIES OF COOK AND WILL and STATE OF ILLINOIS, a Body Politic and Corporate,

Respondent,

vs.

PERCY WAGNER, et al.,

Defendants,

THOMAS M. BORROWDALE, CAROLINE BORROWDALE, his wife and GLADYS K. GAVIN,

Petitioners.

BRIEF IN OPPOSITION OF RESPONDENT, BOARD OF JUNIOR COLLEGE DISTRICT 515, COUNTIES OF COOK AND WILL, STATE OF ILLINOIS.

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INDEX.

	PAGE
Questions Presented	1
Supplemental Statement of Case	3
Argument	5
Conclusion	10

TABLE OF AUTHORITIES.

Am. Ry. Express Co. v. Kentucky, 273 U.S. 269	8,9
Buer v. Hamilton, 48 Ill. App. 2d 171	7
Dowler v. N.Y., Chicago & St. Louis Railway Company, 5 Ill. 2d. 125	7
F.P.D. v. Collins, 348 Ill. 477	7
F.P.D. v. Kercher, 394 Ill. 11	8
Pitrowski v. N.Y., Chicago & St. Louis Railway Company, 4 Ill. 2d. 125	7
Snowden v. Hughes, 321 U.S. 1	9
Stilfield v. Iowa, Ill. Gas, 25 Ill. App. 2d. 478	7
Tennant v. Peoria & P. U. Ry. Co., 321 U.S. 29	7,8
U. S. Constitution	
Fourteenth Amendment	8,9
16 Am. Jur. 2d. Sec. 548; 550	8,9

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To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Respondent prays that a writ of certiorari be denied.

QUESTIONS PRESENTED.

The Petitioners' statement of Questions Presented is not satisfactory and accordingly the following statement of questions presented herein is submitted:

1. When the trial of a state eminent domain case is conducted by one attorney, and after verdict and judgment another attorney substitutes for the attorney who conducted the trial, and thereafter the trial judge comments during the hearing on a motion for new trial that in his *opinion*, if a different theory and other evidence had been presented in the trial of the case, a higher verdict *might* have resulted, does such comment by the trial court constitute the basis of a claim of deprivation of just compensation or due process under the Fifth and Fourteenth Amendment?

2. Can there be a deprivation of just compensation under the Fifth and Fourteenth Amendments in a state eminent domain proceeding, when judgment is entered on the verdict of a jury, which verdict was within the range of the testimony, after jury view and in accordance with legally competent evidence, and when thereafter the same argument presented here was made to the Appellate Court and to the Supreme Court of the state, and the Appellate Court affirmed the judgment below and the Supreme Court denied leave to appeal?

SUPPLEMENTAL STATEMENT OF THE CASE.

The following additions and comments are submitted to correct inaccuracies and omissions in petitioners' Statement of the Case:

A. Background

At pages 3 and 4 of the Petition, the petitioners fail to state that there was a substitution of attorneys for the defendant-petitioners between the judgment on the verdict and the filing of a motion for a new trial.

Petitioners' counsel here substituted as counsel in the trial court *after* the trial, verdict and judgment below, and participated in the trial court proceedings *only* as to the post-trial motion. The argument of this counsel on the post-trial motion revealed that he was either unaware of, or wholly misconstrued the facts and theories of the case *as presented in the trial.*

The three specific comments which the defendants quote are taken wholly *out of context*. In the course of the statement the trial judge stated that it was his *opinion* that the theory of the case advanced by the defendant in the trial was not the best that could have been advanced and that in his *opinion*, if the owner had introduced *other* evidence of value, he believed that a higher verdict *might* have resulted. The trial court recognized these comments for what they were—pure opinion and speculation on his part. Thus, the trial court carefully and explicitly qualified the comments with introductory phrases, and which appear at Abstract page 115:

> "I, *and I emphasize I*, do not think . . ." (Emphasis added.)
>
> ". . . in my opinion, *and I emphasize my opinion* . . ." (Emphasis added.)

And as the court explicitly stated with respect to what the result *might* have been if another theory and other evidence hand been used:

"I *think* they would have gotten . . . more money . . ." (A. 117; R. 434.) (Emphasis added.)

C. Petitioners' Case.

At pages 4 to 15 of their Petition, the petitioners fail to state that *there was no objection to the testimony of the respondent's witnesses McCann and McNamara in the trial of the case.*

D. The Respondent's Case.

At pages 15 and 16, petitioners fail to state that the witness Borrowdale testified that he had acquired the property after tax searches which indicated that most of the lots were tax delinquent. Also, that he testified to a value of the property *if all 603 lots in the subdivision were assembled.* (A. 69-80)

At page 19, petitioners fail to state that the witness Lovelace testified that a lot which is not buildable is not of great value and that he didn't compute the number of buildable sites in the property in question. (A. 92)

At page 19, petitioners fail to note that another witness was presented who admitted he had been hired three hours before he testified.

E. Jurisdictional Statement.

At page 19, under the above title, the petitioners state that the Illinois Appellate Court and Supreme Court ignored or refused to recognize the *alleged* statements of the trial court which petitioners assert herein. Petitioners fail to note that these "*statements*" were the major point of the arguments in the Appellate and Supreme Court. It is ridiculous to assert that the matter was not thoroughly considered by the higher Illinois Courts.

ARGUMENT.

THE STATE COURT PROCEEDINGS BELOW PRESENT NO FEDERAL QUESTION UNDER THE FIFTH AND FOURTEENTH AMENDMENTS AND NO DETERMINATION IN CONFLICT WITH THE DECISIONS OF THIS COURT.

The essence of the Petitioners' argument herein is that it was denied just compensation in a state eminent domain proceeding. It attempts to support this assertion on the basis of *alleged* comments of the trial judge made after the hearing on the motion for a new trial, and on *alleged* incompetence of the respondent's valuation witnesses.

Re the Alleged Trial Court Comments.

The petitioners' attempt to support their assertion of an inadequate award by quoting *out of context*, certain statements of the trial judge *after the arguments on the post-trial motion.*

In order to place this matter in context, it is first to be noted that counsel for petitioners herein was *not* the same attorney who represented the defendants *in the trial of the case.* Petitioners' counsel here substituted as counsel in the trial court *after* the trial, verdict and judgment below, and participated in the trial court proceedings *only* as to the post-trial motion. It was clear from the argument of this counsel on the post-trial motion, that he was either unaware of, or wholly misconstrued the facts and theories of the case *as presented in the trial.*

From just a cursory reading of the *entire* statement of the trial court is is abundantly clear that the trial judge in making the statement was explaining to defendants' counsel (who had not participated in the trial) why the verdict was proper under the evidence and theories of the case as tried below (A. 117-118).

The three specific comments which the defendants quote are taken wholly *out of context*. In the course of the statement the trial judge stated that it was his *opinion* that the theory of the case advanced by the defendant in the trial was not the best that could have been advanced and that in his *opinion*, if the owner had introduced *other* evidence of value, he believed that a higher verdict *might* have resulted. That the trial court recognized these comments for what they were–pure opinion and speculation on his part, is abundantly clear from his very carefully worded remarks. Thus, the trial court carefully and explicitly qualified the comments with introductory phrases, and which appear at Abstract page 115:

> "I, *and I emphasize I*, do not think . . ." (Emphasis added.)
>
> ". . . in my opinion, *and I emphasize my opinion* . . ." (Emphasis added.)

And as the court explicitly stated with respect to what the result *might* have been if another theory and other evidence hand been used:

> "I *think* they would have gotten . . . more money . . ." (A. 117; R. 434.) (Emphasis added.)

Thus it is clear that the subject comments in no respect support the petitioners' assertion that the trial judge felt the jury verdict was inadequate in amount or improper. Quite to the contrary, the denial of the post-trial motion establishes conclusively that the trial court did not consider the verdict inadequate or improper. As stated above, the true meaning of the comments *in context* was that the trial judge was expressing his *opinion* that a higher award *might* have resulted *if the defendants had presented a different theory of the case and evidence*.

The propriety of the trial court's ruling in denying a new trial under such circumstances cannot be subject to question. It has long been established in the law that a trial court has no discretion to interfere with the verdict of a jury which is

consistent with the evidence as presented in the case. In *Buer* v. *Hamilton*, 48 Ill. App. 2d 171 the trial judge had granted a new trial based upon the fact that he felt the award of damages could or should have been larger. In reversing, the court succinctly stated at page 175:

> "Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions *or because judges feel that other results are more reasonable. Tennant* v. *Peoria and P. U. Ry Co.*, 321 U.S. 29, 88 L. Ed. 520; *Stilfield* v. *Iowa-Illinois Gas & Elec. Co.*, 25 Ill. App. 2d 478, 167 N. E. 2d 295; *Dowler* v. *New York Cent. & St. L. R. Co.*, 5 Ill. 2d 125, 125 N. E. 2d 41; *Pitrowski* v. *New York Cent. & St. L. R. Co.*, 4 Ill. 2d 125, 122 N. E. 2d 262.
>
> "Unless the finding of the jury on a question of fact is . . . unreasonable, arbitrary and unsupported by the evidence, . . . *the finding of the jury is binding upon the court under the facts. Stilfield* v. *Iowa-Illinois Gas & Elec. Co.*, 25 Ill. App. 2d 478, 490, 167 N. E. 2d 295." (Emphasis added.)

This principle has been consistently applied under the Illinois law of eminent domain. While the cases in this regard are legion, particularly *apropos*, in light of petitioners' argument herein, is the case of *F. P. D.* v. *Collins*, 348 Ill. 477, where the court stated at page 484:

> *"Appellant insists that the verdict is too low, and that it was the result of confusion, prejudice and passion of the jury.* In cases of this kind, where the evidence is conflicting and the verdict is within the range of the testimony, *courts will not interfere with the finding of the jury* as to the amount of damages . . . (*City of Chicago* v. *McGowan*, 324 Ill. 164; *Forest Preserve District* v. *Barchard*, 293 F. 2d 556). The jury viewed the premises and saw the witnesses who testified and they were better able to weigh the evidence than is this court." (Emphasis added.)

Re Respondent's Witnesses.

In its argument titled "non-existent tract" and "lots are valueless" (Pet. for Writ, pp. 21-23) the petitioners assert that the opinions of the valuation witnesses were not legally competent. As noted above in the statement of the case, *no objection was made to the competence of the witnesses or their opinions of value in the trial of the case.* Under Illinois law, no error can be assigned on appeal in the absence of objection in the trial court. (*F.P.D.* v. *Kercher*, 394 Ill. 11).

Re Federal Question.

The petitioners cite no authority (and indeed none exists) in support of the proposition of a denial of due process under the Fourteenth Amendment incident to a state rule of law involving the competence of valuation evidence, or the findings of fact of a state court jury in an eminent domain proceeding. Moreover, the ruling of the trial court in denying the motion for new trial and the decisions of the Illinois Appellate and Supreme Court in confirming the judgment on the verdict are wholly consistent with the established principle that judges are not free to reweigh evidence and set aside jury verdicts merely because the jury could have drawn different inferences or conclusions or reached other results which judges might deem more reasonable. *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U.S. 29 (1944). The Fourteenth Amendment does not impose a standard for state judicial proceedings different from that applied in Federal judicial proceedings.

It is fundamental that due process in its *procedural* aspect involves matters of the sufficiency of notice, opportunity to be heard and customary proceedings, and that mere error or irregularity in proceedings are not a denial thereof (*Am. Ry. Express Co.* v. *Kentucky*, 273 U.S. 269 [1927]; 16 Am. Jur.2d, Sec. 548.) In its *substantive* aspect, due process involves freedom from arbitrary and discriminatory state action.

(*Snowden* v. *Hughes*, 321 U.S. 1 [1944]; *Am. Ry. Express Co.* v. *Kentucky, supra*; 16 Am. Jur. 2d, 550.) No contention of "unfair" procedural aspects of the proceedings below is presented herein, nor of arbitrary or discriminatory action of state officials. Rather, petitioners merely complain of the result of a jury verdict and assert error or irregularity in judicial proceedings. Accordingly, no Federal question of due process violation under the Fourteenth Amendment is presented herein.

It is submitted that there is no basis in law or fact for the assertion of a violation of the Fourteenth Amendment incident to the state court proceedings herein.

CONCLUSION.

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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